No. 14,923

United States Court of Appeals

For the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

vs.

BRUCE BARBER, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

McMURRAY, BROTSKY, WALKER, BANCROFT & TEPPER,
785 Market Street, San Francisco 3, California,
Attorneys for Appellant.

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DECISION BELOW.

The decision below is unreported. The District Court granted the respondent's motion to dismiss on August 29, 1955 (R. 18). (The order to dismiss by evident inadvertence refers to "plaintiff's motion to dismiss." The only motion to dismiss in the record, however, is the defendant's, and it is clearly this motion which the Court intended to grant.) No opinion was filed by the District Court.

JURISDICTION.

The jurisdiction of this Court is conferred by 28 USC §1294. Jurisdiction below was conferred by 28 USC §§1331, 1346(a), 2201 and 2202, and 5 USC §1009.

QUESTIONS PRESENTED.

The questions which arise here require an interpretation of the Immigration Act of 1917, as amended by the Act of June 28, 1940, Title 2, 54 Stats. 671, and the Act of Oct. 16, 1918, as amended, 40 Stat. 1012, 8 U.S.C. § 137.

1. Does the statute on its face or as construed and applied violate the guarantees of free speech and association, and the due process clause of the First Amendment?

2. Is the statute, on its face or as construed and applied, a bill of attainder?

3. Is the statute void for vagueness?

4. Are the Attorney General of the United States or the Commissioner of Immigration and Naturalization necessary parties?

THE STATUTES INVOLVED.

The Immigration Act of 1917, as amended by the Act of June 28, 1940, Title 2 (54 Stat. 671):

> "Sec. 19. (a) That at any time within five years after entry, any alien who at the time of

entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed, by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to

protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner of Immigration and Naturalization, or at any time not designated by immigration and naturalization officials, or who enters without inspection, shall, upon the warrant of the Attorney General, be taken into custody and deported: *Provided,* That the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this Act: . . . *Provided further,* That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable

to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided further,* that the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof: *Provided further,* That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final.

(b) Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law, shall, upon warrant of the Attorney General, be taken into custody and deported:

(1) Any alien who, at any time within five years after entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

(2) Any alien who, at any time after entry, shall have on more than one occasion, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien or aliens to enter or to try to enter the United States in violation of law.

(3) Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(4) Any alien who, at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

(5) Any alien who, at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940. . . .

(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. . . .

(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U.S.C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes', as amended; (2) the Act of May 26, 1922, entitled 'An Act to amend the Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," approved February 9, 1909, as amended' (42 Stat. 596; U.S.C., title 21, sec. 175); (3) the Act of February 18, 1931, entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics', as amended (46 Stat. 1171; U.S.C., title 8, sec. 156a); (4) any of the provisions of so much of subsection (a) of this section as relates to criminals, prostitutes, procurers, or other immoral persons, the mentally and physically deficient, anarchists, and similar classes; or (5) subsection (b) of this section."

* * * * *

The Act of October 16, 1918 (40 Stat. 1012, as amended, 8 U.S.C. 137):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(1) Aliens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be

prejudicial to the public interest, or would endanger the welfare or safety of the United States;

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

(D) Aliens not within any of the other provisions of this paragraph (2) who advocate the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism, or who are members of or affiliated with any organization that advocates the economic, interna-

tional, and governmental doctrines of world communism, or the economic and governmental doctrines of any other form of totalitarianism, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of such organization; . . .

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (i) the overthrow by force or violence or other unconstitutional means of the Government of the United

States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism.

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (G)....

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1(1) or section 1(3) of this Act or (except in the case of an alien who is legally in the United States temporarily as a non-immigrant under section 3(1) or 3(7) of the Immigration Act of 1924, as amended) a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of

February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT OF THE CASE.

The plaintiff Martin Jimenez, who is the appellant here, is a citizen of the Republic of Mexico who since 1928 has resided continuously in the United States. He is now 53 years of age, married to a naturalized citizen of the United States, and has for many years past been and now is employed in San Francisco as a warehouseman.

The respondent Bruce Barber is the District Director of Immigration and Naturalization for the Thirteenth Immigration District with offices located in San Francisco. He is charged with the execution of the immigration and naturalization laws of the United States in this District, and particularly with the carrying out of orders of deportation (8 CFR §150.10).

On January 2, 1940, the Immigration and Naturalization Service issued a warrant for appellant's arrest. On May 29, 1951, appellant was arrested and charged with being in the United States in violation of the Immigration Act of 1924, in that at the time of entry he was not in possession of an unexpired immigration visa. Thereafter, hearings were held on the warrant charge.

During the course of the hearing, appellant applied for suspension of deportation under the terms of the

Immigration Act of 1917, as amended, 8 USC §155. This statute insofar as relevant is printed in this brief, supra. On August 14, 1952, the Hearing Officer recommended that appellant be deported from the United States for illegal entry and that his application for suspension of deportation be denied. Appellant appealed this decision to the Board of Immigration Appeals. That Board on March 9, 1954, dismissed the appeal. This action was thereafter instituted to secure court review of the action of the immigration authorities, and an injunction against the execution of the deportation order unless and until appellant's application for suspension of deportation has been properly entertained and acted upon.

The complaint alleged the facts just set forth (R. 3-5), and further facts which will be related below. To the complaint the Government interposed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief can be granted; that the Court lacked jurisdiction of the subject matter and of the person of an indispensable party, the Attorney General of the United States; and that the complaint failed to join an indispensable party, the Attorney General of the United States (R. 14). This motion was granted without opinion (R. 18). The entire record consists therefore of the complaint, the motion to dismiss the complaint, and the order of the Court granting that motion.

The complaint alleged that appellant was eligible for suspension of deportation. The facts alleged are that he has been a resident of the United States for

more than seven years prior to his application for suspension of deportation, and had been for the five years preceding that application a person of good moral character (R. 6). It was further pleaded (R. 9-10) that his eligibility for suspension was grounded upon the additional fact of the serious economic detriment that would be suffered by his spouse, a citizen of the United States, in the event of his deportation.

It is further alleged in the complaint that the only ground upon which plaintiff's deportation was sought was his illegal entry into the United States in 1928. At no time was plaintiff charged with membership in the Communist Party of the United States, the Communist Political Association, or any other organization. In fact it affirmatively appeared by the statement of the Hearing Officer at the deportation hearing that no accusation of membership in any organization was made against the appellant (R. 5-6). Nevertheless, the Immigration Service decided that appellant was not eligible for suspension of deportation because of his refusal to answer questions about his membership in or affiliation with certain organizations, including the Communist Political Association and the Communist Party.

His refusal to answer these questions at first included the period during which he was required to establish good moral character, that is, for the 5 years preceding his application for suspension of deportation. Subsequently, however, appellant modified his position on this question and offered, if the case before the administrative agency could be reopened, to

testify in answer to questions regarding such membership or affiliation for that 5 year period. The application to reopen the cause for the purpose of answering such questions was denied by the Board of Immigration Appeals on March 22, 1955, on the ground that this would be insufficient to establish appellant's eligibility for suspension of deportation (R. 6, 7).

The refusal to exercise the discretion vested in the Attorney General of the United States to grant or deny suspension of deportation was sought to be justified by the theory that the statute under which suspension was sought, that is, the Act of June 28, 1940, 54 Stat. 671, required plaintiff in the circumstances here presented to establish that he was not at any time a member of that group or class made ineligible for suspension of deportation by the statute, and specifically that he was not and never had been since his entry a member of the Communist Political Association or the Communist Party of the United States (R. 7).

The complaint alleged that appellant was informed and believed and on information and belief alleged that the denial of suspension of deportation in his case was in part based upon secret information contained in the file of the Immigration and Naturalization Service, which information was not disclosed to plaintiff but was disclosed to and known by those officials of the Immigration Service who recommended or sustained the recommendation that suspension of deportation be denied.

The first cause of action set forth the facts upon which appellant relied for his prayer for injunctive relief. In a second cause of action he set forth the same facts, and asked for a declaration that the denial of his application for suspension of deportation and the deportation order against him are null and void.

SUMMARY OF ARGUMENT.

1. The statute as construed and applied, or on its face, violates the guarantees of free speech and association and of due process of law in the First Amendment.

The holding out of a privilege by an agency of the Government upon condition of non-membership in certain organizations violates the guarantees of freedom of speech and association. To require assurances of such non-membership is therefore also a violation of those guarantees. *Lawson, Jr., et al. v. Housing Authority of Milwaukee,* 270 Wis. 269, 70 N.W.2d 605; *Chicago Housing Authority v. Blackman,* 4 Ill.2d 319, 122 N.E.2d 522.

The use of secret evidence, consisting of statements by persons with whom the accused is not confronted, violates the guarantee of due process of law. *Parker, et al. v. Lester, et al.,* ..... F.2d ..... (9 Cir., Oct. 1955).

2. As construed and applied, or on its face, the statute is a bill of attainder, prohibited by the Constitution of the United States in Article I, Section 9, Clause 3.

The statute inflicts civil punishment by legislative fiat, without judicial or other trial, upon persons who are members of organizations named in the statute.

United States v. Lovett, 328 U.S. 303; *Mahler v. Eby,* 264 U.S. 32; *Cummings v. Missouri,* 4 Wall. 277. Membership alone punishes. *Wieman v. Updegraff,* 344 U.S. 183. Only acceptance of the proposition that membership in named organizations, without more, is sufficient to disqualify an applicant for suspension of deportation makes the questions regarding such membership relevant to consideration of an application for suspension of deportation. Hence the denial of suspension because of failure to answer questions regarding such membership or affiliation must fall with the statute and for the same reasons.

3. The statute is void for vagueness.

To require appellant to establish that he is not a member of any class declared ineligible for suspension of deportation by the relevant statute is to impose an impossible burden. The terms of the statute are so vague and ill defined that no man can know, much less establish by evidence, whether he is or is not within the classes excluded from the benefits of suspension of deportation. A deportation statute, like a criminal statute, may be void for vagueness. *Jordan v. de George,* 341 U.S. 223.

4. The Attorney General is not a necessary party.

The question of necessary parties is determined on practical considerations. *Shaughnessy v. Pedreiro,* 349 U.S. 48, 54. Since the District Director executes deportation orders, an injunction restraining him from carrying out the deportation order until the requirements of the law have been met will adequately afford

appellant complete relief. *Williams v. Fanning,* 332 U.S. 490.

ARGUMENT.

I. VIOLATIONS OF FIRST AMENDMENT GUARANTEES.

A. As construed and applied, the statute violates the guarantee of free speech and association.

As construed by the Immigration Service, the statute under which appellant applied for suspension of deportation requires in addition to the express conditions of eligibility set forth in sub-section (c)(2), that appellant affirmatively establish that he is not and has never been since his entry into the United States a member of certain proscribed organizations (R. 7). Those organizations include the Communist Party and the Communist Political Association.

The organizations are identified by name alone. Nothing is said in the statute, nor is any evidence required by the Service about their nature, aims or objectives. Their legality or illegality (cf. *Communist Party v. Peek,* 20 Cal.2d 536) is immaterial. Knowledge of their aims is not required. If those organizations are now, or were at any time subsequent to the alien's entry into the United States lawful organizations, or engaged in any lawful pursuits, this is no excuse for membership in them. If the alien's membership or affiliation was limited in purpose to obtaining the necessities of life, membership is nonetheless ground for denial of discretionary relief. Cf. *Galvan v. Press,* 347 U.S. 522; *Garcia v. Landon,* 99 L.Ed. 48.

The effect of this construction of the statute is therefore to allow suspension of deportation only on condition that the applicant shall have refrained from exercising his constitutional right to freedom of speech and association.

Governmental action of exactly the same sort has been considered recently by the Supreme Court of Wisconsin and of Illinois in *Lawson, Jr., et al., v. Housing Authority of the City of Milwaukee,* 270 Wis. 269, 70 N.W.2d 605. The Supreme Court of Wisconsin considered the application of the so-called "Gwinn Amendment" to the Independent Offices Appropriations Act of 1953, Public Law 455, 82nd Congress, 66 Stat. 403, 42 USC §1411(c). That amendment provided that no housing unit constructed with federal funds should be occupied by a person who is a member of an organization designated as subversive by the Attorney General. The defendant Housing Authority in Milwaukee adopted a resolution, numbered 513, providing that leaseholders were required to execute a certificate of non-membership in such organizations as a condition of continued tenancy.

The plaintiffs in that case belonged to an organization listed by the Attorney General. They refused to sign the certificate of non-membership but tendered rent to the Authority for their apartment. The rent was refused and returned to them, and they were notified that they must vacate the premises. They filed an action in the state courts seeking a declaration and the Gwinn Amendment was invalid and unconstitutional. The Supreme Court of Wisconsin found that

the resolution was unconstitutional and void because it violated the provisions of the First Amendment. The Court cited *Frost & Frost Trucking Co. v. Railroad Commission,* 271 U.S. 583, 47 ALR 457, and *Hannegan v. Esquire Inc.,* 327 U.S. 146. It quoted from the last named case at p. 156, where the Supreme Court said:

> "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 421-423, 430-432, 437, 438, 41 S.Ct. 352, 357, 358, 360, 361, 363, 65 L.Ed. 704. *Under that view the second-class rate could be granted on condition that certain economic or political ideas* not be disseminated. (Italics supplied.)"

In *Chicago Housing Authority v. Blackman,* 4 Ill. 2d 319, 122 N.E.2d 522, the Supreme Court of Illinois reached the same conclusion as the Supreme Court of Wisconsin. The question was raised whether the oath required of the tenants of federally supported housing projects by the Chicago Housing Authority, under the Gwinn Amendment, was constitutional. The Housing Authority pointed out that they could evict tenants who refused to sign the oath by giving them a 15-day notice to quit. The Court said:

> "The argument, in other words, is that because the tenants have no legal right to occupy the

housing accommodations, they cannot be deprived of any constitutional right by the requirements in question. The position is untenable. A similar contention was rejected in Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216; where State employees were required by statute to take an oath concerning their affiliation with certain proscribed organizations, as a condition of continued employment. The court held that statute invalid . . .

A like conclusion must follow in the present case. Even though appellants have no right to remain as tenants of appellee, they may not, as a condition of continued occupancy, be required to comply with unconstitutional requirements."

The Court pointed out that appellants had not alleged membership in any subversive organization, but held that they still had standing to challenge the oath requirements because the grounds for their eviction was not membership in an organization, but refusal to take the oath. That case is thus on all fours with the case at bar. Governmental withholding of a privilege was there based upon a requirement that those seeking the privilege must establish non-membership in organizations. Upon the authority of *Wieman v. Updegraff* the Supreme Court of Illinois held the Gwinn Amendment and the oath requirement unconstitutional and void.

There is no need to labor the point. A statute or regulation by which a governmental agency withholds a privilege unless the applicant for the privilege establishes that he has not exercised certain constitu-

tional rights protected by the First Amendment, infringes First Amendment rights.

It may be argued that *American Communications Assn. v. Douds,* 339 U.S. 382 has so altered our basic law on First Amendment rights that this infringement of those rights is allowable. In the *Lawson* case, supra, the Supreme Court of Wisconsin considered the effect of the *Douds* decision. It pointed out that in that case Congress had found the danger to commerce from the likelihood of political strikes. Commenting on the application of that decision to the Gwinn Amendment, the Court said:

> "It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through communists in control of labor organizations disrupting commerce by calling strikes to carry out Communist Party policy. This court deems the possible harm which might result in suppressing the freedom of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects. For this reason we must hold Resolution 513 adopted pursuant to the Gwinn Amendment to be unconstitutional and void."

In the case at bar there are several circumstances which indicate that here, as in the *Lawson* case, there is no showing that either Congress or the Immigra-

tion and Naturalization Service regarded it as essential that applicants for suspension of deportation give up their First Amendment rights. First of all, there is the fact that here the Immigration Service issued its warrant for appellant's arrest in 1940 but took no action to execute the warrant until 1951. Second, it has promulgated no regulations requiring that applicants for suspension of deportation forego their rights to join organizations or to exercise First Amendment rights generally. Third, there is evidence that the Immigration Service has no reason to fear activity inimical to the interests of the country from the appellant here, for the Hearing Officer stated at the deportation hearing that there was no accusation against appellant of membership in any organization (R. 5, 6).

Of more importance perhaps is the fact that the Congress has, since the passage of the statute upon which appellant relies here, allowed suspension of deportation even to those who were formerly members of the Communist Party. See Sec. 1254(a) of 8 USC, the Immigration and Nationality Act of 1952, subsection 5.

Even without regard to that statute, the Immigration Service itself has found that persons admittedly closely associated with subversive organizations are not thereby rendered ineligible for suspension of deportation. See *In the Matter of K—*, 2 I&N 838, where the Board of Immigration Appeals allowed suspension of deportation in the case of one who had been a business partner of a notorious Nazi, one of

the leaders of the German-American Bund. His partnership with the leader of the Bund terminated only when the latter was arrested. He had accompanied his partner on two occasions to meetings of the Bund, had received literature from the German Library of Information, and had applied for membership in a national organization, controlled by the Nazis, of Germans who had fought in the German Army during World War I.

In the Matter of R—, 3 I&N 532, the applicant for suspension of deportation was an Italian who had been a member of the Fascist Party in Italy from 1925 until the time when he came to the United States in 1939. Even while in the United States he had been in favor of the then Government of Italy, which he felt was "all right for the people." During the period when the United States was at war with Italy he "favored Italy" according to his own testimony. He, too, was found eligible for suspension of deportation.

But it may be said that the Congress by providing that membership in the Communist Party or the Communist Political Association is ground for deportation indicated that members of those organizations were persons whose presence here is so inimical to the welfare of the United States that their rights of free speech and association must be limited. To this contention there are several answers. It will be argued in this brief below that the statute is a bill of attainder when it provides deportation for membership in an organization identified by its name alone. If that argument is correct, then the statute is void

in this particular and will, of course, provide no excuse for a violation of First Amendment rights.

The second answer to the argument is that the statute does not in terms require applicants for suspension of deportation to establish that they are not members of the classes who are made deportable by the statute. Had this been the congressional purpose, it would have been very easy to do at the time that the statute was amended to provide that members of the Communist Party are deportable.

The third answer to the argument is that it proves too much. Among those whose deportability is set forth in the statute are numerous classes, including those guilty of nearly every conceivable major crime, as well as those with various defects, physical or mental. Did Congress find that members of these classes are so inimical to the United States that they are required to surrender their constitutional rights to freedom of speech and association? If not, why then are members of the Communist Party or of the Communist Political Association singled out? Again, since most members of these numerous classes are denied suspension of deportation, the statute as construed here means that one must establish to the satisfaction of the Attorney General that he is not within any such class before he can be eligible for suspension of deportation. Such a task is really beyond the power of any person, and surely was not contemplated by the Congress when it passed the statutes in question.

There is, therefore, nothing in the present Act which corresponds to the fear expressed by Congress that Communist leaders of trade unions would foment political strikes. The question whether an applicant for suspension of deportation has ever been a member of the Communist Party is therefore immaterial. If the applicant meets the statutory standards of eligibility, as appellant in this case does, his First Amendment rights are still protected. If it is true that the *Douds* decision breached the hitherto impregnable wall that surrounded First Amendment rights, yet the breach is not wide enough to admit invasion of appellant's rights under the circumstances present here. It is not the business of Courts to enlarge it.

B. The use of secret evidence violates the guarantee of due process contained in the First Amendment.

It is alleged (R. 7, 8), and must on this appeal be taken as true, that the denial of suspension of deportation was in part based upon the use of secret information contained in the files of the Immigration Service, but not disclosed to appellant. That is to say, statements taken from "faceless informers" has been used to deny discretionary relief for which appellant has satisfied the statutory requirements. This Court has very recently considered the effect of the use of secret evidence. In *Parker et al. v. Lester, et al.,* ..... F.2d ....., it ruled that the right of a seaman to prospective employment could not be denied by a governmental agency without confronting him with the witnesses and evidence against him. Cf. the concur-

ring opinions of Mr. Justice Black and Mr. Justice Douglas in *Peters v. Hobby,* 349 U.S. 331.

It is true that in *Jay v. Boyd,* 222 F.2d 820, this Court upheld the use of confidential information in denying suspension of deportation. The question may soon be resolved by the Supreme Court of the United States which on January 9, 1956, granted certiorari in that case. In any event, the question should be re-examined. The considerations that moved the Court to its decision in *Parker v. Lester,* supra, have equal application to the case at bar. If, as Abraham Lincoln pointed out, yesterday's dogma is unequal to the stormy present, then there must be thinking anew.

II. THE STATUTE IS A BILL OF ATTAINDER.

The statutory interpretation here attacked is that the statute provides that members of the Communist Party and the Communist Political Association are not eligible for suspension of deportation. Therefore, it is argued, the Attorney General or his agent may require an applicant for suspension of deportation to establish that he is not a member of a class statutorily ineligible for suspension of deportation. The power of the Attorney General to require such a showing by an applicant for discretionary relief must fall if the statute itself falls. Thus we are brought to the question whether the provision that a member of the Communist Party may be deported by reason of his membership in that organization is either on its face or as construed and applied a bill of attainder.

By the familiar cases a bill of attainder is defined as a statute which by legislative fiat imposes punishment upon named individuals or the members of an easily identified class. *United States v. Lovett,* 328 U.S. 303. Here deportation (and ineligibility for suspension of deportation)is visited upon aliens who are or have been members of a class denominated "members of the Communist Party of the United States". The class is not described in any other way. It is not described, that is to say, by hurtful characteristics which might make its classification reasonable.

It is true, of course, that the punishment inflicted here is not a criminal sanction but a civil one. *Mahler v. Eby,* 264 U.S. 32. That it may be punishment, although civil in nature, is clearly established by those cases which have condemned legislative acts as bills of attainder. Thus, in *United States v. Lovett,* supra, proscription from government employment by a statute which directed that none of the monies appropriated for the expense of the government should be used to pay the salaries of certain named government employees was held to be punishment. There was nothing criminal about that sanction. In *Cummings v. Missouri,* 4 Wall. 277, it was held that prohibiting one from following the occupation of a priest and a teacher unless he first took an expurgatory oath was punishment. In *Ex parte Garland,* 4 Wall. 333, decided the same day as the *Cummings* case, a rule of the Supreme Court of the United States prohibited the practice of law before it by attorneys unless they first took an expurgatory oath. This was also found

to impose punishment. In *Burgess v. Salmon,* 97 U.S. 381, the collection of a tax on tobacco prior to the effective date of a statute which imposed the tax was held to be "civil punishment".

Further, deportation, in the form of transportation, was a penalty well known to the criminal law of England. See 1 Stephen, *History of the Criminal Law of England,* pp. 480, 481; and cf. the civil punishments imposed by English bills of attainder. In the *Cummings* case the Supreme Court cited the statute of 1 George I, Chap. 13, which among other punishments provided a civil penalty of 500 pounds to be recovered against any member of the class there punished by anyone who sued for it. The statutes 9 and 10 William III, Chap. 32, also cited, impose civil disabilities of incapacity to hold public office and inability to sue in the civil courts.

We have here, therefore, a statute which punishes membership alone. That such a statute is void because in violation of the bill of attainder clause of the Constitution would seem to require no extensive argument. In *Wieman v. Updegraff,* supra, a statute which punished membership alone was held unconstitutional. Cf. the decision of this Court in *Ex parte Fierstein,* 41 F.2d 53; see also *Kessler v. Strecker,* 95 F.2d 976, 96 F.2d 1020, aff. 307 U.S. 22.

There is no direct ruling by appellate courts on this question. *Galvan v. Press,* 347 U.S. 522, does not decide the issue. There, although the Court sanctioned deportation for prior membership in the Communist Party, appellant was in no position to claim that the

Communist Party was not an organization which advocated overthrow of the government by force and violence. He had, as the opinion makes clear, offered to reenter the Communist Party as a spy for the government. The point here raised could therefore not have been proposed by Galvan. Nor did the Court purport to pass on the question whether the statute was a bill of attainder.

Again, in *American Communications Association v. Douds,* 339 U.S. 382, the Court considered whether the Labor Relations Act was a bill of attainder when it provided that members of the Communist Party could not remain as leaders of trade unions. The Court there distinguished the ruling cases on bills of attainder on the ground that

> ". . . Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. * * *
>
> "This distinction is emphasized by the fact that members of those groups identified in §9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in

> §9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett, supra, 328 U.S. at page 314, 66 S.Ct. at page 1078, 90 L.Ed. 1252; Cummings v. Missouri, supra, 4 Wall. at page 327, 18 L.Ed. 356. Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

So in the case at bar the punishment is imposed for past acts, or the questions are asked with relation to past acts. By the reasoning adopted by the Supreme Court in the *Douds* case, the statute here under consideration if construed as requiring no evidence of the nature and purpose of the Communist Party or the Communist Political Association, is a bill of attainder. One who belonged to it, believing it to be a wholly innocuous and proper organization, with no advocacy of overthrow of the government by force and violence, would be punished by reason of his membership although he had committed no wrong.

III. THE STATUTE AS CONSTRUED AND APPLIED IS VOID FOR VAGUENESS.

The Supreme Court in *Jordan v. De George,* 341 U.S. 223, has held that a deportation statute may, like

a criminal statute, be void for vagueness. As the statute in question here has been construed and applied by the Immigration Service, it requires an applicant for suspension of deportation to establish that he is not within any of the classes which are by the statute made ineligible for suspension of deportation. An examination of the statute will disclose what such a task would entail. An applicant for suspension of deportation under this rule would have to establish that he has not at any time since entry been a member of any of the following classes:

(1) Aliens who seek to enter the United States to engage in activities which would be prejudicial to the public interest or would endanger the welfare or safety of the United States;

(2) Aliens who at any time shall be or have been anarchists;

(3) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(4) Aliens who are members of or affiliated with the Communist Party of the United States, any other totalitarian party of the United States, the Communist Political Association, the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, or any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or the direct predecessors or successors of any such association or party;

(5) Aliens who advocate the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism, or the economic and governmental doctrines of any other form of totalitarianism;

(6) Aliens who are members of or affiliated with any organization which is registered or required to be registered under section 786 of Title 50;

(7) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law, or the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the Government of the United States or of any other organized government, because of his or their official character, or the unlawful damage, injury, or destruction of property, or sabotage;

(8) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or have in their possession for the purpose of circulation, publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating the over-

throw by force or violence or other unconstitutional means of the Government of the United States or of all forms of law, or the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the Government of the United States or of any other organized government, or the unlawful damage, injury, or destruction of property, or sabotage, or the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism;

(9) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in the last paragraph above;

(10) Aliens with respect to whom there is reason to believe that they would be likely to engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or other activity subversive to the national security;

(11) Aliens with respect to whom there is reason to believe that they would engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unconstitutional means,

or organize, join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50.

In addition to all of these, the alien would have to establish that he is not one who has been convicted of violations of the law regarding narcotics, the use of machineguns, nor a criminal, prostitute, procurer, other immoral person, the mentally or physically deficient, an anarchist, or "similar classes", made deportable under Sec. 19(a) of the Act (printed supra herein.)

To do so is manifestly beyond the powers of any man. Not only would it be impossible for him to marshal the evidence necessary to meet this test, but the classifications are so vague and indefinite that it would be impossible for him to know whether he was within the class or without. How does one know, for example, whether he is an alien "with respect to whom there is reason to believe" that he would be likely to engage in activities which would be prohibited by the laws of the United States relating to espionage, etc.?

It is appellant's position that the statute does not require any such impossible burden of an applicant for suspension of deportation. The construction placed upon the statute by the Immigration Service is highly artificial and unreasonable. It is also administratively unworkable. If this were uniformly required of applicants for suspension of deportation, no one would

ever have his deportation suspended. But the Immigration Service has so construed it in this case. Such an interpretation must be rejected by the Court.

IV. THE ATTORNEY GENERAL IS NOT AN INDISPENSABLE PARTY.

In this case the appellant has brought his action for an injunction and for declaratory relief against the District Director of Immigration and Naturalization. It is this officer who is charged by the applicable regulations (8 CFR §150.10) with the carrying out of deportation orders and orders to suspend deportation. He is before the Court and within the jurisdiction of the Court. That no other immigration official is necessary is clearly demonstrated by the decision of the Supreme Court in *Shaughnessy v. Pedreiro,* 349 U.S. 48:

> "We also reject the Government's contention that the Commissioner of Immigration and Naturalization is an indispensable party to an action for declaratory relief of this kind. District Directors are authorized by regulation to issue warrants of deportation, to designate the country to which an alien shall be deported, and to determine when his mental or physical condition requires the employment of a person to accompany him. The regulations purport to make these decisions of the District Director final. It seems highly appropriate, therefore, that the District Director charged with enforcement of a deportation order should represent the Government's interest. Otherwise in order to try his case an

alien might be compelled to go to the District of Columbia to obtain jurisdiction over the Commissioner. To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule. Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner.

"It is argued, however, that the Commissioner should be an indispensable party because a judgment against a District Director alone would not be final and binding in other immigration districts. But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities. Nor is it to be assumed that a second effort to have the same issue decided in a habeas corpus proceeding would do any serious harm to the Government . . . Our former cases have established a policy under which indispensability of parties is determined on practical considerations. See, e.g., Williams v. Fanning, 332 U.S. 490, 92 L.ed. 95, 68 S.Ct. 188. That policy followed here causes us to conclude that the Commissioner of Immigration and Naturalization is not an indispensable party."

SUMMARY.

This Court is here asked to review and set aside the action of an administrative branch of the Government which seeks to substitute for the scheme adopted by the Congress one which holds out a privilege or benefit upon condition that the privilege-seeker forego Constitutional rights. The rights involved are those which have been thought to be characteristic of a democracy. Their maintenance is the task of all proponents of democracy, and the power to uphold them resides in this Court.

The Government here seeks, upon the basis of material gathered from those who hide behind an administrative cloak of anonymity, to subject the appellant to an inquisition upon his beliefs and associations ever since he came to the United States twenty-eight years ago. Further, perhaps because there is no real belief that his answers if truthfully given would afford any basis for exercising their claimed arbitrary power, they seek to require him to establish a negative—that he has not ever been in a class ineligible for suspension of deportation.

To allow the procedure the Government has employed in this case is to penalize a wholly inoffensive and valuable member of our community. Much more important, it is to sanction an interpretation of the statute which makes a mockery of the Constitutional prohibition against bills of attainder. And it is to allow the Government to do, on the basis of surmise, what it could not do if it were required to substantiate its suspicions by evidence produced in the light

of day. We may say with Montaigne that it is putting a very high value on our surmises to burn a man because of them.

While this Court sits, punishment should follow wholly democratic and Constitutional procedure only. The use of faceless informers should be recognized as an expedient devised, used and defended by those whose conception of Government is quite other than that of our Constitution.

Dated, San Francisco, California,
February 13, 1956.

Respectfully submitted,
McMurray, Brotsky, Walker,
Bancroft & Tepper,
By Lloyd E. McMurray,
Attorneys for Appellant.